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No. 88-1688

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

v.

GEORGE R. TRIPLETT, ET AL.
Respondents.

OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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STATEMENT

The opinion of the lower court, which appears as an appendix to the Petition for Writ of Certiorari filed by the Department of Labor, is incorporated by reference.

This opinion was originally published as *Committee on Legal Ethics v. Triplett,* 376 S.E.2d 818 (W.Va. 1988), and was subsequently republished, as corrected, at 378 S.E.2d 82.

REASONS FOR DENYING PETITIONS

Contrary to the assertions of the petitioners, the lower court did not fail to give proper deference to a duly enacted act of Congress, nor did it misunderstand or misapply the results and reasoning of *Walters v. National Association of Radiation Survivors,* 473 U.S. 305 (1985). Nor did it lack factual support for its conclusions concerning the operation and effects of the Federal Black Lung Program in West Virginia. Consequently, the petitions for certiorari filed by the United States Department of Labor and the West Virginia State Bar should be denied.

JUDICIAL DEFERENCE

The Department of Labor begins its attack on the lower court's opinion by asserting that "the Court below starkly misconceived its proper role by failing to pay the necessary deference owed to an Act of Congress." Petition at 12. In support of this argument, the petitioner then quotes the following language from the court's opinion in *Walters v. National Association of Radiation Survivors,* 473 U.S. 305, 319 (1985): "Judging the constitutionality of an act of Congress is properly considered the gravest and most delicate duty that [the judiciary] is called upon to perform, and we begin our analysis here with no less deference than we customarily pay to the duly enacted and carefully considered decision of a co-equal and representative branch of our government."

What the petitioner neglects to mention is that the case at bar, unlike *Walters,* does not involve a claim of facial invalidity.[1] The lower court in this case held that

1. It should also be noted that the *Walters* court may have exercised unusual deference in reviewing the VA fee system because "the statute in question . . . [had] been on the books for over 120 years" 473 U.S. at 319. The federal black lung program, on the other hand, has only been in existence for 20 years, and during that brief period of time, it has undergone numerous and extensive revisions and amendments. *See generally Mullins Coal Co. v. Director, OWCP,* 484 U.S. 135 (1987); Lopatto, *The Federal Black Lung Program: A 1983 Primer,* 85 W.Va.L.Rev. 677 (1983). More specifically, there were no regulations concerning attorney fees in black lung proceedings until August 31, 1972. *Watson v. Hew,* 562 F.2d 386, 388 (6th Cir. 1977).

the black lung fee system was unconstitutional *as applied, Committee on Legal Ethics v. Triplett,* 378 S.E.2d 82, 89 (W.Va. 1988), but the *Walters* Court did not "determine the merits of the appellees' individual 'as applied' claims." 473 U.S. at 337 (O'Conner, J., concurring).

Thus, the lower court's ruling does not challenge an Act of Congress, but its application in a way which is probably contrary to the will of Congress. It is difficult to believe that when Congress created the federal black lung program, it intended to create a system flawed by inordinate delays in paying attorney fees, or that resulted in inadequate compensation for claimants' attorneys. There is certainly no evidence that Congress intended to prevent claimants from obtaining counsel. In fact. such representation is expressly contemplated in the black lung regulations. *See* 20 CFR 725.363(a).

The Walters Decision

In *Walters v. National Association of Radiation Survivors,* 473 U.S. 305 (1985), this Court rejected a due process challenge to the statute which limits the attorney's fee available in Veterans Administration [VA] proceedings to $10.00. Although the petitioners argue that the *Walters* decision compels a similar result in the present dispute, the two cases are so markedly different as to justify different conclusions concerning the constitutionality of their respective fee systems.

What *is* important about *Walters* for purposes of resolving the present dispute is the reasoning used by

the Court in reaching its decision, and not the result itself. Under *Walters,* the lower court was required to balance a number of factors, including the government's interest in retaining the present fee system, the claimants' interest in obtaining black lung benefits, and the danger of erroneous denials of claims if counsel were not available to assist claimants in obtaining benefits. As noted below, the lower court did not err in applying this test.

Government Interest in Regulating Fees

The government's interest in requiring approval of attorney fees in black lung cases is ostensibly to prevent responsible operators and the black lung trust fund from being overcharged. These parties are normally represented by counsel, however, and are quite capable of using black lung proceedings to protect their interests.

The government's interest in prohibiting direct fee agreements between claimants and their attorneys is allegedly to prevent overreaching by counsel. Unfortunately, this scheme which was intended to prevent the needless depletion of benefits frequently results in claimants receiving no benefits at all.

Whatever interest the government may have in protecting claimants from overreaching and excessive fees is adequately protected by the bar's own normative rules. Between 1970 and 1989, West Virginia operated under a code of professional conduct modeled on the ABA Model Code. Effective January 1, 1989, the state adopted the ABA Model Rules of Professional Conduct. Under both sets of rules, ample provision has been made to regulate overreaching and the charging of excessive fees. *See* West Virginia Code of Professional Responsibility, DR 2-106; W.Va. Rules of Professional Conduct, Rule 1.5.

Of course, what the respondent really objects to in this case is not the required agency approval of attorney

fees, or the prohibition against direct fee agreements with claimants, *per se,* but the ordinate delays in payment of attorney fees, and inadequate compensation for attorney fees, which have plagued the system for years. It is doubtful that the state has *any* interest in perpetuating these operational flaws.

Private Interest in Retaining Counsel

Black Lung claimants and recipients have important property interests in receiving the statutory benefits to which they are entitled.

Although this Court has never squarely decided whether applicants for statutory benefits have a property interest entitling them to the protection of due process, its repeated recognition of the due process rights of applicants in government licensing and regulation cases leads to the conclusion that applicants for statutory entitlements should also be accorded due process.[2]

Moreover, the lower courts have frequently held, in cases involving other benefit distribution schemes, that due process does apply in the application stage, because it is the statutory creation of an entitlement, and not the actual receipt of benefits, that establishes a protected property interest.[3] Interestingly enough, some of the

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2. *See, e.g., Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1, 11-12 (1979) (applicants for parole); *Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957) (applicant for admission to practice law); *Goldsmith v. United States Board of Tax Appeals,* 270 U.S. 117, 123 (1926) (applicant to practice before board of tax appeals). *Cf. Gregory v. Town of Pittsfield,* 470 U.S. 1018 (1985) (O'Conner, J., dissenting) (would grant petition for writ of certiorari to determine whether due process protects applicant for general assistance from arbitrary denial).

3. *See, e.g., Daniels v. Woodbury County, Iowa,* 742 F.2d 1128, 1132-33 (8th Cir. 1984) (general assistance); *Kelly v. Railway Retirement Board,* 625 F.2d 486, 489-90 (3d Cir. 1980) (disabled child's annuity under railway retirement act); *Griffeth v. Detrich,* 603 F.2d 118, 120-22 (9th Cir. 1979) (general relief), *cert. denied sub nom. Peer v. Griffeth,* 445 U.S. 970 (1980); *Nat'l Assn. of*

regulations promulgated pursuant to the federal black lung statutes recognize that claimants for pneumonoconiosis benefits have due process rights.[4]

In any event, this Court need not address the nature of a person's purely prospective interest in benefits, since some of Mr. Triplett's clients were claimants "from whom the government sought repayment of an alleged overpayment of benefits," *Committee on Legal Ethics v. Triplett,* 378 S.E.2d 82, 92 n. 31 (W.Va. 1988), or had been "shortchanged" in their benefits. *See* Transcript of Disciplinary Hearing at 67-71 (Testimony of Euna Ball), and these clients clearly had a vested property interest in their benefits. *Cf. Walters v. National Association of Radiation Survivors,* 473 U.S. 305, 320 n. 8 (1985) (diminution in benefits already being received constituted a protected property interest).

Fee limitations also impair enjoyment of an important liberty interest – the right of an individual to consult with attorneys on matters affecting his legal rights. *See Powell v. Alabama,* 287 U.S. 45, 68-9 (1932); *Potashnick v. Port City Construction Co.,* 609 F.2d 1101, 1117-19 (5th Cir.), *cert. denied,* 449 U.S. 820 (1980).[5]

NOTES *(Continued)*

Radiation Survivors v. Walters, 489 F. Supp. 1302 (N.D. Cal. 1984) (veterans' disability benefit), *rev'd on other grounds,* 473 U.S. 305 (1985).

4. *See* 20 CFR §722.122 ("In order to ensure that each claimant for pneumoconiosis benefits under a state workmen's compensation law be afforded *due process of law,* including notice and opportunity to be heard on all matters materially affecting such claimant's claim, no state workmen's compensation law shall be included on the secretary's list unless it provides, or regulations promulgated pursuant to such law provide . . . that a claimant in a contested case shall have a right to a full adversary hearing to resolve contested issues of fact or law") (emphasis supplied).

5. In addition to impairing the ability of claimants to obtain much needed benefits, excluding lawyers from the system may create an appearance of injustice that detracts from the perceived legitimacy of the claims process.

In terms of need, black lung claimants, as a group, more closely resemble the welfare recipients in *Goldberg v. Kelly,* 397 U.S. 254 (1970), than the social security beneficiaries in *Mathews v. Eldridge,* 424 U.S. 319 (1976), or the disabled veterans in *Walters v. National Association of Radiation Survivors,* 473 U.S. 305 (1985).

Under West Virginia law, a miner will seldom be able to recover compensation for pneumoconiosis from his employer in a civil tort action. The standard for recovery established by W.Va. Code §23-4-2 for suits against employers is simply too difficult to meet. *See generally Mooney v. Eastern Energy Associated Coal Corp.,* 326 S.E.2d 427, 433 & n. 2 (W.Va. 1984) (Miller, J., dissenting). Thus, in most cases, a claimant's only hope of obtaining compensation for his black lung related disability lies in some form of state or federal entitlement program.

Many recipients do not have other sources of income,[6] and even when other sources are available, they frequently result in a reduction of benefits under the black lung program. Under 30 U.S.C. §922(b), benefit payments "shall be reduced . . . by an amount equal to any payment received . . . under the workmen's compensation, unemployment compensation, or disability insurance laws of [a miner's] state on account of [his] disability . . . due to pneumoconiosis, and the amount by which such payments would be reduced on account of

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6. The federal black lung program was created in 1969 largely because "few states provide[d] benefits for death or disability due to this disease [pneumoconiosis] to coal miners or their surviving dependents." 30 U.S.C. §901(a). Twenty (20) years later the Secretary of Labor has yet to find that any state, including West Virginia, has a workers' compensation system which "provides adequate coverage for pneumoconiosis." 20 CRF §722.152(b).

excess earnings . . . "[7] *See also* 30 U.S.C. §932(g), 20 CFR §§725.533(a)(1), 725.536. Black lung benefits may also be reduced because of "[a]ny compensation or benefits received under or pursuant to any federal law . . . because of death or partial or total disability due to pneumoconiosis." 20 CFR §725.533(a)(2). In cases where multiple reductions apply, a claimant's black lung benefits can be reduced to nothing. *See* 20 CFR §725.539.

Probability of Error

Contrary to petitioners' assertions, the probability of error if claimants are not represented by counsel is very high, a conclusion justified by common sense as well as empirical observation.

The black lung program is much more inhospitable to claimants than the veterans disability system considered by this Court in *Walters v. National Association of Radiation Survivors,* 473 U.S. 305 (1985). Even before the 1981 amendments to the black lung act significantly restricted eligibility for benefits, the approval rate for new claims had fallen to 10% or less. Lopatto, *The Federal Black Lung Program; A 1983 Primer,* 85 W.Va.L.Rev. 677, 695 (1983). Following the 1981 amendments, the approval rate was roughly halved, and now stands at approximately 5.8%. *Committee on Legal Ethics v. Triplett,* 378 S.E.2d 82, 88 and n. 15 (W.Va. 1988). By contrast, half of all VA claims are approved. *Walters,* 473 U.S. at 309, 327.

Veteran claims are not subject to any statute of limitations, *Walters,* 473 U.S. at 311, while any claim by or on behalf of a miner must be "filled within three years after a medical determination of total disability due to pneumoconiosis . . . has been communicated to the

7. Unlike many states, West Virginia does provide workers' compensation benefits for the victims of occupational pneumoconiosis. *See, e.g.,* W.Va. Code §§23-4-1, 23-4-6a.

miner . . ." 20 CFR §725.308(a). This time limit is "mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances." 20 CFR §725.308(c).

Veterans also enjoy the services of various veterans organizations which provide competent assistance, free of charge, to anyone who desires their help in obtaining disability benefits. *Walters v. National Association of Radiation Survivors,* 473 U.S. at 311-12 & n. 4 (1985). During the brief 20-year history of the Black Lung Act, no comparable infrastructure has arisen to assist black lung claimants.[8]

Once a veteran files a claim, there are few deadlines to meet, and they tend to be quite liberal. For example, if a veteran is dissatisfied with the ruling of the rating board, he can file a notice of disagreement at any time within 1 year from the date of mailing of notification of the initial review and determination. *Walters,* 473 U.S. at 311; 38 CFR §§ 19.129, 19.124.

At several stages of black lung litigation, however, there are fairly short deadlines which a claimant may have to meet to preserve his claim. *See, e.g.,* 20 CFR §725.403(b) (filing state workmen's compensation claim) (30 days from notice); 20 CFR § 725.409(b) (response to deputy commissioner's notice of denial by reason of abandonment) (30 days); 20 CFR § 725.410(c) (response to deputy commissioner's initial finding of non-eligibility) (60 days); 20 CFR § 725.419 (request for hearing or revision of deputy commissioner's proposed decision and order must be made within thirty (30) days

8. Although the United Mine Workers of America (UMWA) has represented many claimants in the past, economic considerations have forced it to curtail this service. "District 31, one of three districts serving West Virginia, has ceased such representation due to lack of money." *Committee on Legal Ethics v. Triplett,* 378 S.E.2d 82, 92 n. 30 (W.Va. 1988) citing Brief of Amicus Curiae, Jane Moran, attached letter of January 26, 1987 from Eugene Claypole, John Darcus and James Sluser of UMWA.

of issuance); 20 CFR § 725.479 (request for reconsideration of decision by ALJ must be made within thirty (30) days); 20 CFR §§ 725.481, 802.205(1), (appeal to Benefits Review Board [BRB] from decision of ALJ) (30 days); 20 CFR § 802.205(b) (cross-appeal to BRB from decision of ALJ) (14 days); 20 CFR § 725.482 (appeal from decision of BRB to Circuit Court) (60 days). *See generally* 20 CFR § 725.409(a)(3) (a claim may be denied by reason of abandonment when a claimant fails to pursue his claim with reasonable diligence); 20 CFR § 802.205(c) ("Any untimely appeal will be summarily dismissed by the [Benefits Review] Board for lack of jurisdiction.").

Black Lung claimants are usually elderly,[9] unemployed,[10] and sick,[11] with little schooling[12] and

9. According to the Department of Labor's 1983 report to Congress, the miner and widow beneficiaries in its survey were "predominately elderly, with a mean age of 70." U.S. Department of Labor, Employment Standards Administration, *A Sample Survery of All Sources of Both Monetary and Non-Monetary Income of Black Lung Beneficiaries* 14 (1983). *See also Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcomm. on Labor Relations of the House Comm. on Education and Labor,* 99th Cong. 1st Sess. 115 (1985) (Statement of James DeMarce) ("the typical incoming claim is from someone whose age is somewhere between the midfifties and midsixties")

10. In 1982, one in twenty miners and widow beneficiaries (5.5%) were employed either full time or part time. . . .

> Of the miners living with their spouses, 9% had wives who worked sometime during 1982. About 3% of the miner beneficiaries worked for pay at some time since receiving black lung benefits. . . .

DOL Sample Survery at 15. *See also Investigation of the Backlog* at 115 (Statement of James DeMarco) (people typically apply for black lung benefits when "they become seriously ill, and are no longer able to work or they may experience a prolonged layoff in the industry and tend to file for benefits at that time; or perhaps most commonly of all, when they retire they will file a claim for benefits").

relatively modest financial resources.[13] These disabilities seriously impair their ability to represent themselves in proceedings which are often "viciously adversarial." *Committee on Legal Ethics v. Triplett,* 378 S.E.2d 82, 92

11. As this Court noted in *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 7 (1976), black lung disease is an irreversible, progressive illness for which there is no therapy. It "affects a high percentage of American coal miners with severe, and frequently crippling, chronic respiratory impairment." *Id.* at 6. *See also Mullins Coal Co. v. Director, OWCP,* 98 L.Ed. 450, 457 (1987).

In 1982, only 5.5% of miners and widow beneficiaries were employed either full or part time. *DOL Sample Survey at 15.* "Of those who were not employed during 1982, 72% of the miners and 60% of the widow beneficiaries reported 'ill or disabled' as the main reason for not working in 1982. *Id.*

The general ill health of black lung beneficiaries should come as no surprise, given their advanced age, and the fact that benefits are only available upon a showing of death or total disability due to pneumoconiosis. *See* 30 U.S.C. §901(a); 20 CFR §§718.1, 725.1, 725.201.

12. In the 1983 DOL survey.

> The typical miner received little formal education; only one in ten graduated from high school. In fact, three-fourths of these miners did not even attend high school. Widow beneficiaries tended to have slightly more education than miner beneficiaries, with 18% being high school graduates. A few of the widow beneficiaries (4%) attended college.

U.S. Department of Labor, Employment Standard Administration, *A Sample Survey of All Sources of Both Monetary and Non-Monetary Income of Black Lung Beneficiaries,* 14 (1983).

13. *See Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcom. on Labor Relations of the House Comm. on Education and Labor,* 99th Cong. 1st Sess. 131 (1985) (Statement of John T. Jarvis) ("the average black lung recipient is not a wealthy person. The income to the household in general is usually less than $10,000.00"). Sadly, many miners "use up all of their personal finances for treatment of their illness" prior to receiving black lung benefits. *Delays in Processing and Adjudicating Black Lung Claims: Hearing before a Subcomm. of the House Comm. on Government Operations,* 99th Cong., 1st sess. 10-11 (1985).

(W.Va. 1988) citing Brief of Amicus Curiae, Jane Moran, affidavit of Robert Cohen at 8-9, affidavit of Frederick Muth at 5-6.

Under 20 CFR §725.360, responsible coal mine operators and their insurance carriers are parties to black lung proceedings, and needless to say, they have a strong financial interest in opposing claims.[14]

"[T]he responsible operator feels he is going to be paying maybe $50,000 or $100,000 over a lifetime, so he can well afford to spend $5,000 to $10,000 to fight a non-paid attorney." *Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcomm. on Labor Relations of the House Comm. on Education and Labor,* 99th Cong. 1st Sess. 22 (1985) (statement of Martin Sheinman, Esquire).

The presence of parties with interests antagonistic to those of claimants results in a markedly adversarial system. More than ninety percent (90%) of the claims approved at the deputy commissioner level will be challenged by coal mine operators. *Committee on Legal Ethics v. Triplett,* 378 S.E.2d 82, 92 n. 27 (W.Va. 1988). *See also Delays in Processing and Adjudicating Black Lung Claims: Hearing Before a Subcomm. of the House Comm. on Government Operations,* 99th Cong., 1st Sess. 109 (1985) (statement of James Sluser, Compensation Director, District 31, UMW) ("I know of no responsible operator that has agreed to pay a claim without going through administrative law judge procedures.") This is a far cry from VA proceedings, in which

14. "The actuarial value of a 1982 claim by a living miner with a spouse is nearly $150,000.00." Lopatto, *The Federal Black Lung Program: A 1983 Primer,* 85 W.Va.L.Rev. 677, 686 (1983), citing actuarial chart in Black Lung Benefits Act Annual Report, U.S. Department of Labor 33 (Jan. 1981). In addition to disability benefits, responsible operators are liable for a claimant's medical expenses, 30 USC §932(a), attorney fees. 33 U.S.C. §928(a), 20 CFR §725.367, and interest. *Clinchfield Coal Co. v. Cox,* 611 F.2d 47 (4th Cir. 1979); 20 CFR §725.608(a).

veterans encounter no "opponent" other than a government agency which is required by law to assist them in pursuing their claims. *See Walters v. National Association of Radiation Survivors,* 473 U.S. 305 (1985).[15]

Even at the deputy commissioner level, which is intended to be fairly informal in operation, claimants can benefit greatly from the assistance of counsel in meeting their burden of proof. The outcome of disability proceedings is often determined by the operation of various legal presumptions which the average claimant is unlikely to know about or understand without professional advice. Attorneys can also play an important role in gathering and interpreting evidence, and presenting the claimants case. *See generally* Sellinger, *What Are Lawyers Good For?: The Radiation Survivors Case, Non-Adversarial Procedures, and Lay Advocates,* 13 Journal of the Legal Profession 123 (1988).

Part of the complexity of black lung practice stems from the fact that the "program has been developed through several statutory enactments [so that] different rules govern claims filed during different periods of time." *Mullins Coal Co. v. Director, OWCP,* 98 L.Ed.2d 450, 457 (1987) (footnote omitted). Consequently, as the lower court observed:

> . . . the history of black lung legislation demonstrates that even the *filing* of a claim for benefits is complex. It often requires a lawyer to determine which benefit structure applies to a particular claim.

Committee of Legal Ethics v. Triplett, 378 S.E.2d 82, 88 (W.Va. 1988) (emphasis in original).

15. In *Walters,* the Court relied heavily on the nonadversarial nature of VA proceedings in upholding a $10.00 limit on attorney fees, warning that "counsel may well be needed to respond to opposing counsel or other forms of adversary in a trial-type proceeding . . ." 473 U.S. at 333.

As claims progress beyond the deputy commissioner level, proceedings become increasingly formal and legalistic. At the ALJ level, parties may cross-examine witnesses, 20 CFR §725.457, take testimony through depositions and interrogatories, 20 CFR §725.458, make oral arguments and file briefs. 20 C.F.R. §725.459. The advantage of retaining counsel in such proceedings is obvious. *See Scanlan v. Secretary of HEW,* 428 F.Supp. 313 (E.D. Pa. 1976) (proper interpretation of medical evidence and proper presentation of case necessitated presence of counsel); *Lincovich v. Secretary of HEW,* 403 F.Supp. 1307, 1313 (E.D. Pa. 1975) (unfavorable ruling reversed after claimant obtained counsel).[16]

According to statistics provided by the Department of Labor, in ALJ proceedings, claimants with attorneys prevail 29% of the time but, when claimants proceed *pro se,* they prevail only 11.6% of the time. *Committee on Legal Ethics v. Triplett,* 378 S.E.2d 82, 98 (W.Va. 1988). Thus, as the lower court noted, claimants with counsel "have a likelihood of prevailing that is 2.5 times greater than claimants appearing *pro se." Id.* at 97.

These figures stand in sharp contrast to data concerning ultimate success rates before the Board of Veterans Appeals which indicates that veterans with counsel fare only slightly better than veterans represented by various service organizations, or proceeding *pro se. Walters,* 473 U.S. at 331, 327.

This difference in success rates underscores the more difficult nature of black lung claims. As the Court observed in *Walters,* "complex" VA claims amount to only a "tiny fraction" of "the total cases pending." 473 U.S. at 330.[17] "[T]he great majority of [VA] claims

16. It is difficult to imagine how the average black lung claimant, with only a grade school education, can effectively depose a medical or vocational expert retained by his adversary.

17. Cases in which a veteran asserts injury from exposure to agent orange or radiation account for only about 3 in 1,000 claims at the regional level and 2% of appeals to the BVA. 473 U.S. at 329.

involve simple questions of fact, or medical questions relating to the degree of claimant's disability; . . . [and] only the rare case turns on a question of law." *Id.* "The black lung claims process," on the other hand, "is procedurally, factually and legally complex." *Committee on Legal Ethics v. Triplett,* 378 S.E.2d 82, 92 (W.Va. 1988). *See also Mullins Coal Co. v. Director, OWCP,* 98 L.Ed.2d 450, 457 (1987) ("some aspects of the black lung benefits program are rather complex").

The value of having legal representation at black lung proceedings is recognized by everyone who can afford to retain counsel. Responsible coal mine operators and their insurance carriers are represented in black lung proceedings by private attorneys whose fees are not regulated or reviewed by the Department of Labor, while the disability trust fund is represented by attorneys provided by the government.

Unfortunately, the number of attorneys in West Virginia who will represent black lung claimants is small and dwindling. According to the affidavit of Grant Crandall, which was part of the record in the lower court, there are only about twelve (12) attorneys in West Virginia who regularly handle black lung claims. This is a remarkably small claimant's bar given the number of practicing attorneys in West Virginia (over 3,000) and the large number of black lung claims filed in that state (roughly ⅕ of the national total). Although the parties may dispute why this is so, one fact seems unmistakably clear — most attorneys in West Virginia are not willing to practice black lung law on a regular basis.

The reason for this lack of enthusiasm is widely recognized in West Virginia — the present system of compensating attorneys for black lung claimants.

Furthermore, not "all such claims would be complex by any fair definition of that term: at least 25% of all agent orange cases and 30% of the radiation cases . . . are disposed of because the medical examination reveals no disability." *Id.*

> . . . those lawyers who agree to handle black lung cases are having trouble being reimbursed by the Black Lung Office. The result is that in some cases we have fees that are backed up 3 or 4 years.
>
> What is the ultimate result? It is a deterrent and that means that capable lawyers will not be willing to handle the claimants' cases because they know they can never be paid for them.

Delays in Processing and Adjudicating Black Lung Claims: Hearing Before a Subcomm. of the House Comm. on Government Operations, 99th Cong., 1st sess. 32 (1985) (statement of Rep. Robert E. Wise, Jr.).

The Record

In section IV of its opinion, the lower court provided a concise and lucid discussion of the facts which led it to conclude that long delays in payment, "without any provision for interest, and the lack of premiums to offset the contingent nature of the work," discouraged most attorneys in West Virginia from handling black lung claims. 378 S.E.2d at 91.

The court had an adequate factual basis for these conclusions. In addition to various government reports and congressional hearings cited in its opinion, it had the benefit of the transcript from Mr. Triplett's disciplinary hearing (at which several attorneys testified concerning the operation of the black lung program in West Virginia), the *amicus curiae* brief filed by Jane Moran, Esquire (who has herself been actively involved in representing claimants in black lung proceedings), affidavits submitted by five (5) attorneys who constitute approximately ⅓ of the lawyers who regularly handle black lung claims in West Virginia at this time, and various materials submitted by the Department of Labor to supplement the record.

Mrs. Moran's memorandum is attached to this opposition at pages 1a-10a. The affidavit of Thomas H. Zerbe, Esquire appears as an appendix to the Department of Labor's petition for certiorari at pages 11a-32a. The other four (4) affidavits considered by the lower court appear as appendices to this opposition at pages 33a-45a. Selected excerpts from the transcript of Mr. Triplett's disciplinary hearing (which is 329 pages long in its entirety) appear as an appendix to this opposition at pages - .

Respondent respectfully submits that this material provided an adequate factual underpinning for the lower court's conclusions.

Conclusion

For the foregoing reasons, the respondent respectfully submits that the petitions for certiorari should be denied.

GEORGE R. TRIPLETT
By Counsel

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Barbara H. Fleisher
HUNT & WILSON
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APPENDIX

IN THE
SUPREME COURT OF APPEALS OF
WEST VIRGINIA AT CHARLESTON

Disciplinary Proceedings No. 18396

COMMITTEE ON LEGAL ETHICS
OF THE WEST VIRGINIA STATE BAR,
Complainant,

v.

GEORGE TRIPLETT, a member of the West Virginia State Bar,
Respondent.

BRIEF OF AMICUS CURIAE JANE MORAN

Jane Moran
Attorney at Law
Post Office Box 1519
Williamson, WV 25661
(304) 235-3509

There presently exists in the State of West Virginia a large population of sick, old coal miners, their dependents or their survivors. Many[1] have waited for extended periods of time – some over ten years – for Administrative review of their Black Lung claims. Most of them will discover, when they finally have their day in Court, that their claim is technically without merit or has been precluded from consideration by legislation enacted years before their appearance. They have continued in their misguided belief in the validity of their claim

1. Exact figures of the present backlog of cases is not available but is estimated to be in the thousands.

because they have not been able to obtain competent counsel to review it for them.

A high price is demanded of those who attempt to extract the life's blood of West Virginia's economy from the arteries in her mountains. As his lungs become clogged with the insidious and pervasive dust, the miner is given a graphic projection of the quality of life which lies ahead. The nature of the disease being progressive, the miner feels himself increasingly weakened and helpless; unable to provide even the most modest of support for his family.

The full extent of the debilitating impact of long term exposure to coal dust was recognized with passage of the Black Lung Benefits Act in 1969. The Act – one title of the Federal Coal Mine Health and Safety Act[2] – was Congress' acknowledgement of the failure of state workers' compensation programs to address the devastating effects of this disease.

The original legislation was comparatively narrow in scope. It covered underground miners and their wives or widows only. The definition of pneumoconiosis was restricted. Widows could not claim benefits unless the miner was collecting benefits at the time of his death or it could be proven that his death was caused by pneumoconiosis. Subsequent amendments to the law[3] expanded these definitions, but also created a maze of evidentiary hurdles and procedural complexities. The regulations which control review of a Black Lung claim are now determined by the point in time at which a

2. 83 Stat. 792, 30 U.S.C. 801 et seq.

3. Black Lung Benefits Act of 1972, 86 Stat. 151, 30 U.S.C. 901 et seq.; The Black Lung Benefits Revenue Act of 1977, 92 Stat. 11, The Black Lung Benefits Reform Act of 1977, 92 Stat. 96; The Black Lung Benefits Amendments of 1981, 95 Stat. 1643; The Black Lung Benefits Revenue Act of 1981, 95 Stat. 1653, 26 U.S.C. 1 note and the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272 13203(a)(d), 100 Stat. 312, 313, 26 U.S.C. 9501 note (1986).

claim was filed. Part B of the Act sets the standards for claims filed before July 1, 1973.[4] Part C of the Act provides for claims filed on or after July 1, 1973. There are sub-sections of Part C. One section covers claims filed before April 1, 1980 – the other claims filed after April, 1980. These later sections are regulated by "Permanent Criteria" and "Interim Regulations", respectfully. The legislation and the regulations are overlapping and seemingly contradictory. These apparent irregularities have been the subject of considerable case law. The result is an extremely detailed and complex body of law which is material for nightmares of attorneys venturing into this field of law for the first time. The threat is intensified by the total lack of facilities providing an educational background in this field or even a more modest offering of seminars.

As the complexities of the law evolved, several other factors combined to delay the processing of claims. The changes in the law resulted in different agencies handling the claims. Most of the cases previously processed by the Department of Health, Education and Welfare were transferred to the Department of Labor in 1974. In 1977 the Department of Health, Education and Welfare and the Department of Labor were told to review all previously denied and pending cases under the new legislation. Claimants were given their choice of agency to review their claim. During the late 1970's and early 1980's the Department of Labor hired an unprecedented number of Administrative Law Judges to perform the mandated new processing. Hundreds of cases were set for hearing. The Judges and the claimants soon discovered there were few lawyers available to handle the overload.

The Black Lung Bar in West Virginia was active and comparatively numerous during the years after passage

4. And, for a limited number of survivor's claims filed after 1973.

of the original Act. This group diminished as the burden of proof shifted further against the claimant with each new layer of legislation.[5] Presumptions that had previously been available to balance the uncertainties of medical testing devices were limited or abolished. Entire categories of eligible claimants were excluded by the new amendments. Reporting requirements for fee petitions were — and are — onerous and time consuming.[6] Presently, the award of fees is restricted — the hourly rate unpredictable. The slow process of appeal, further elongated by remands for development of evidence, has resulted in years of delay before the counsel for a successful claimant receives his or her fee.

The cost of litigating these claims escalated for the claimant as his burden of proof increased. Defense counsel, taking full advantage of the more rigid standards, initiated discovery procedures which paled by comparison those used in the earlier stages of law. Claimants' attorneys are now faced with extensive interrogatories. They are required to travel out of state for depositions, accruing not only travel costs, but the expense of days lost from their offices to travel time.

The shift of the burden of proof in the law has been exaggerated in effect by the refinement of defense medical techniques. X-rays are read and re-read by defense doctors. A minority of claimants are able to bear the expense of a reputable facility for original testing and evaluation of their condition. Those who are, have watched these valid, objective evaluations of disabling lung disease caused by coal dust discredited by the sheer numbers of defense doctors who explain away the disease of other factors. Supported by seemingly endless

5. Statistics provided by the U. S. Department of Labor, Office of Coal Mine Safety and Office of Workers' Compensation Programs reflect the following success rates on Black Lung claims: (See attached page)

6. See Exhibit 1 attached to this Brief at pages 6 & 7 and Exhibit 5 at page 2.

resources, defense counsel have been increasingly skillful at deflecting the impact of credible claimant's evidence.

These factors have converged to drive experienced counsel from the field of Black Lung litigation and to discourage new practitioners from entering the field. Concurrently, the burden of Black Lung representation previously carried by the federally funded Legal Services Corporation and District 31 of the United Mine Workers of America has been dropped. Until steps are taken to relieve claimant's counsel from the unreasonable and unrealistic financial burden which the present legislative structure places on them, there is no reason to believe the present crisis in representation will be relieved.

A bottleneck in processing pending West Virginia claims occurred in the early 1980's and, as a result of the factors listed above, has continued to exist up to the present. Some claimants who filed as long ago as 1979[7] are now being brought before a Judge for hearing.

The present active Black Lung Claimants Bar in West Virginia is limited to less than fifteen members. Hundreds of pending claims remain to be set for hearing. Claimants have been required to take action to maintain the vitality of their claims during the years of waiting. Those with counsel have managed to comply with the reporting requirements. Many of those without counsel or who are represented by attorneys unfamiliar with the law will find, when they finally reach the Court, that their claim is dead.

Equally frustrating is the experience of those classes of claimants who have been excluded from or included in coverage by amendments to the law or regulations of such complexity as to be incomprehensible to any but

7. William H. Acord. Claim No. CH 232-18-1714, 88 BLA 2407.

the well trained legal mind.[8] It is unrealistic to assume

8. Set forth below is a footnote from a paper titled "Notes on the Black Lung Benefits Act" by Nicodemo DeGregorio. It has been favorably recognized and your petitioner has been provided with a copy by an Administrative Law Judge in response to her inquiries regarding the history of the act.

> The coverage of coal transportation work presents peculiar problems. One problem arises where the area of extraction (mine) and the area of preparation (tipple) are not contiguous, and coal is transported from the mine to the tipple over public roads. Whether a truck driver performing such transportation work is a miner over the entire route depends on such factors as the distance separating the tipple from the mine, ownership or operation of both the tipple and the mine by the same operator, employment by this operator, etc. It is apparent that the Reform Act has enlarged the definition of "miner" (1) by covering a greater area, "in or around a coal mine or coal preparation facility", and additional functions, "coal mine construction or transportation", and (2) by removing the requirement of "employment". It is noted that the Act in effect presumes that a miner engaged in the extraction of preparation of coal is exposed to coal dust, but makes coverage of the additional functions explicitly subject to a showing of exposure to coal dust. This difference, however, is minimized by the presumptions created in 20 C.F.R. 725.202(a). This section provides that in the case of an individual engaged in coal transportation or coal mine construction there shall be a rebuttable presumption that such individual was exposed to coal mine dust during *all* periods of such employment occurring in or around a coal mine or coal preparation facility. The section also provides that an individual employed by a coal mine operator, "regardless of the nature of such individual's employment", shall be considered a miner unless such individual was not employed in or around a coal mine or coal preparation facility.
>
> Thus, in order for an individual to come within the definition of "miner" both the situs test and the function test must be met. Although these two elements of the definition are conceptually distinguishable, they may best be handled together. Specifically, it would appear that in most cases the situs factor would be predominant and would draw within the definition work which, by itself, would not be deemed extraction or preparation of coal. For example, a mechanic engaged in the repair and maintenance of mining equipment may well be deemed a miner if the work is done, as a rule, in or around a mine or coal preparation facility. The case may be quite different if the same work on the same equipment is performed in a shop at some distance from the mine or facility, especially if the shop is owned by a person other than the owner of the mine or facility. It is suggested, as a working hypothesis, that all activities which (1) are *regularly* performed in or around a mine or preparation facility, and (2) are an integral part of the *process* of extracting or preparing coal, come within the meaning of "in the extraction or preparation of coal". See *Smith v. Central Ohio Coal Co.*, ____BRBS ____, BRB No. 77-293 BLA (January 31, 1979). On this theory, coal cutting or scraping, coal loading, roofbolting, repair and meaintenance, laying of tracks, operating of shuttle cars, are all covered activities if performed in a covered area.

that the average lay person can even detemine the qualifications for becoming a member of the covered class. No one can seriously argue the lay person is competent to comprehend the even more complex framework of medical proof required for a winning claim.

The problems created by the backlog of unrepresented claimants is shared by all parties involved in the litigation. Claimants appear for hearing with no understanding of procedure or proof requirements. The Administrative Law Judges travel to hearing locations throughout West Virginia from their offices situated throughout the country. They have typically issued notices for three to four day dockets. These dockets often degenerate into a series of continuance motions by claimants who have been unsuccessful in their search for counsel. Conscientious defense counsel must justify to their client the escalating costs of this seemingly unproductive ritual.

Attached to this Brief are five affidavits of attorneys who actively practice in the Black Lung Bar. (Exhibits 1 through 5). They represent approximately one-third of the West Virginia practitioners who are active in the

field. They all discuss the problem which must be addressed before there can be any realistic hope of expanding the Black Lung Bar. The costs of litigating a significant number of Black Lung claims is unrealistic for the medium or small size firm; it is impossible for the solo practitioner to bear. Until the fee structure is redesigned to accommodate extraordinary litigation expenses of Black Lung claims, there is no inducement for attorneys to venture into this area where the odds of success are so small. Until some provision is made to provide for investigation and discovery costs, claimant's counsel is left at the mercy of defendant's counsel, who are being paid for each hour of discovery which they initiate and reimbursed for their investigation costs. The problem can only get worse unless some form of aggressive action is taken.

Several suggestions were generated at a recent joint meeting of the Administrative Law Judges, representatives of the West Virginia Board of Health, defense counsel and claimant's counsel.
They include:

1. Amendment to the law to allow for a retainer fee.

2. Amendment of the law to allow certification for a minimal fee for representation.

3. A minimal fee paid from the Black Lung disability Trust Fund.

4. A fund created by the West Virginia State Bar to pay the costs of the Legal Services Corporation reassuming the burden of this litigation which they once shared.

5. Regulations which would require counsel for both the defense and the claimant to work on a contingency fee arrangement.

Some aggressive action must be taken if the Black Lung benefits program is to remain a viable assistance program for miners disabled as a result of exposure to coal dust. A labyrinth of regulations lies between each Black Lung claimant and the benefits which have been set aside for him. Without competent counsel to guide him, the quest becomes increasingly hopeless. One approach to making the law more responsive to the people it was enacted to serve is to provide a fee structure within which competent counsel are willing to work. Until this is provided, claimants will be unable to obtain adequate legal assistance and will thus be denied their due process rights under law. [SIGNATURE AND ADDRESS OMITTED]

BLACK LUNG CLAIMS
January 1, 1982 - March, 1988

Fiscal Year	Initial Claims	Initial Approval After Exam by Dept of Labor Doctor	Initial Denials	Reversal of Initial Denial After Submission of Evidence	Reversal of Initial Approval after Submission of Evidence	Overall Approval Rate (not included in Dollar Statistics)
88 (1st Qtr.)	2,066	80	1,986	+18	-4	
87	8,668	317	8,351	+77	-25	
86	9,813	280	9,533	+158	-15	
85	11,116	374	10,742	+125	-38	
84	13,145	617	12,528	+111	-15	
83	11,259	483	10,776	+77	-10	
1/1/82-9/30/82	2,613	74	2,539	+8	0	
Totals:	58,680	2,225	56,455	+574	107	4.6%

ALJ & Benefits Review Board
January 1, 1982 - December 31, 1987

	Approvals		Denials	Totals	Approval Rate	
			ALJ Decisions			
Total Appeals	Uphold	97	2,883	2,980	22.7%	3.4%
3,819	Reversal	770(-)	69(+)	839		
	Total	867	2,952	3,819		
			Benefits Review Board Decisions			
Total Appeals	Uphold	2	151	153	4.6%	3.4%
175	Reversal	6(-)	16(+)	22		
	Total	8	167	175		

AFFIDAVIT

STATE OF WEST VIRGINIA,
COUNTY OF MARION, TO-WIT:

This day before the undersigned authority, a Notary Public in and for the County and State aforesaid, appeared ROBERT F. COHEN JR., who after being duly sworn, deposes and says:

I have been engaged in the practice of law for 14 years. Except for one year when I lived in Charleston, West Virginia, I have practiced in Fairmont, West Virginia. During this period I have represented former coal miners in federal black lung claims. My experience in the representation of claimants in black lung cases includes representation before the Social Security Administration under the 1972 Amendments to the Act, and before the United States Department of Labor in cases arising under the 1972 Amendments, the 1977 Amendments and the 1982 Amendments to the Act. I have handled appeals of denials in both the United States District Court for the Northern District of West Virginia and the United States Court of Appeals for the Fourth Circuit.

From the time I began handling black lung claims until a few years ago, I represented a large volume of claimants in these cases. However, over the past several years, I have had to restrict my practice (or at least the intake of new black lung cases) very drastically. The reasons for this include restrictive changes in the law, the inefficient processing of claims by the Department of Labor, and the inability to get paid even in the cases in which I prevail.

The law was changed by the 1982 Amendments to become much more restrictive in its eligibility criteria. Most notably, these changes eliminated the presumption that a miner who had worked for 15 or more years and who is suffering from a totally disabling chronic

respiratory or pulmonary impairment would be presumed to have pneumoconiosis. As a result of these restrictive amendments, far fewer claimants are winning their claims than at an earlier time. I have heard estimates that approximately 10% of claimants are awarded benefits under the 1982 Amendments. My own experience would indicate that this estimate is reasonably accurate.

However, the restrictive changes in the law are not the major reason why I am restricting my black lung practice. Much more significant to me is the incredible inefficiency of the appellate process in the Department of Labor and the inability to collect a legal fee even when I have prevailed in a case.

When I speak of inefficiency in the Department of Labor, I am primarily referring to the Benefits Review Board. There are delays in the processing of claims by the Office of Administrative Law Judges. However, these delays are not nearly as great as they used to be. Moreover, my experience is that the majority of administrative law judges make a good faith effort to process black lung claims fairly and efficiently.

The level at which the system has entirely fallen apart is the Benefits Review Board. The Benefits Review Board has always taken a long time to issue decisions. Right now, it is taking from two to three years, from the time that a notice of appeal is filed, to the time when the Board will issue a decision. This delay is not the fault of the lawyers for claimants or employers. Under the Rules of the Benefits Review Board, briefs must be filed shortly after the Board issues an acknowledgement of a notice of appeal. What typically happens is that after the briefs are filed, it still takes the Benefits Review Board a couple of years to issue a decision.

When the Benefits Review Board finally issues a decision, the result is frequently a remand to the Administrative Law Judge requiring the Judge to reevaluate the evidence. Although the Board articulates a standard

of "substantial evidence", and claims that it does not substitute its judgment for that of the Administrative Law Judge, my opinion is that this is not the case. It appears to me that the Board makes a practice of re-weighing the evidence and substituting its opinion for that of the Judge. In particular, I believe that the Board does this with a degree of bias in favor of the denial of claims.

Over the last eight or nine years, the Benefits Review Board has issued a number of very significant decisions which restrict eligibility and which have been reversed on appeal in the various federal circuit courts of appeal. This pattern of legal mis-interpretation is consistently anti-claimant. Because of the slowness of the process, it is frequently many years until the legal mis-interpretation by the Benefits Review Board is corrected. For example, in 1987, the United States Court of Appeals for the Fourth Circuit issued a decision in *Sykes v. Director, OWCP,* 812 F.2d 890 (4th Cir. 1987), which reversed an extremely important decision which the Benefits Review Board had issued in 1980. Between 1980 and 1987, there were probably thousands of incorrect decisions issued because of the Board's decision in *Sykes.* Now some of these decisions are being reviewed again for those claimants who kept their appeals alive. However, there is a vast number of claimants who simply abandoned their claims after being denied. Some of these claims are meritorious, and now they cannot be litigated because of the incompetence and bias of the Benefits Review Board.

Moreover, as a result of the Benefits Review Board issuing legally incorrect decisions, cases frequently bounce back and forth between the Board and the Administrative Law Judge as one decision after another is remanded. For example, in one of my cases, the Administrative Law Judge issued an award of benefits in 1982, the employer appealed, the Benefits Review Board sent the case back to the Judge in 1985, the Judge again

issued an award of benefits in 1985, the employer appealed again, and the Benefits Review Board again remanded the case on July 27, 1988. After the Administrative Law Judge's next decision, I would guess it will be 1991 before the Board issues another decision. This is on a claim which was filed in 1978. This history of delays is not particularly unusual. In one of my cases, the claimant filed his claim in 1976, an Administrative Law Judge issued a decision awarding benefits in 1984, the employer appealed, the Benefits Review Board remanded the case in 1986, the case was assigned to a different Administrative Law Judge who denied benefits in 1987, and it is now before the Board on my appeal. In another case, the claimant filed his claim in December, 1973, I began to represent him in December, 1975, the Administrative Law Judge awarded benefits in 1987, and we are presently awaiting the processing of the case by the Benefits Review Board.

The third element which makes it difficult to continue to represent black lung claimants is the inability to get paid for my work. The law is structured so that when a claimant has been awarded benefits, any legal fee will be paid by the responsible coal operator or, if there is no operator involved in the case, by the Black Lung Disability Trust Fund. Thus, the claimant will not have to pay a legal fee for representation. To obtain a fee, a lawyer must submit a properly executed fee application to the appropriate decision making level within the Department of Labor. In other words, the lawyer sends one fee application to the Deputy Commissioner for his time spent at that level of the case, a second fee application to the Administrative Law Judge for his time spent at that level, and a third fee application to the Benefits Review Board for time spent at that level. Usually there are lengthy delays from the time that a fee application is submitted to the time that it is approved. In addition to the normal human delays, the processing

of the fee application is delayed if the particular administrative level does not have the file. Thus, for example, I submitted a fee application to the Deputy Commissioner two and a half years ago in a case, and the application has not been acted upon because the file is at the Benefits Review Board.

Even after the fee is approved, the claimant's attorney does not get paid if the case is on appeal. This is because of a policy which provides that the decision must be "final" before the claimant's attorney is paid. Thus, in the case I mentioned earlier, where the Administrative Law Judge awarded benefits to the claimant in 1982, my fee application was approved by the Judge in 1982 but I have not been paid yet. There is no provision in the regulations for any interest on an attorney fee. Thus, in the case which was approved in 1982, I have been making an interest-free loan of over $3,000.00 to Consolidation Coal Company for the past six years. In another case, where the Deputy Commissioner had made a finding in favor of the claimant and the employer appealed, the Administrative Law Judge after the hearing dismissed the employer based on a finding that the claimant had not been a coal miner after 1969 and remanded the case to the Deputy Commissioner for the continued payment of benefits based on the claimant's work as a miner prior to 1969. The Director of the Office of Workers' Compensation Programs has appealed this decision to the Benefits Review Board. The Director does not contest the claimant's entitlement, but only the finding that the coal company should have been dismissed. The Administrative Law Judge has awarded me a fee which the Director refuses to pay because the case is not yet "final". Thus in this case, I am making an interest-free loan of over $6,000.00 to the Black Lung Disability Trust Fund in a case where the claimant's eligibility is not an issue on appeal.

At the present time I am owed in excess of $30,000.00 in black lung attorney fees which have been

awarded over the years but not yet paid. This does not count a number of situations where I have simply not filed the fee application as yet because I know it will not be acted upon by the Deputy Commissioner (because, as mentioned earlier, the Deputy Commissioner does not have the file).

I have seen numerous letters from the Department of Labor to claimants stating that they can get a lawyer to represent them and will not have to pay for it. I find this practice somewhat disingenuous in view of the fact that the Department of Labor is unable to process claims efficiently or (in many cases) correctly, together with the fact that claimants' representatives cannot get paid even after they prevail in the case.

The final element in this situation is that the cases have become increasingly complex, and that coal companies spend great resources to fight black lung claims. Thus, in addition to retaining highly competent counsel (who I assume are well and promptly paid), the coal companies expend great sums of money for physicians to perform examinations, re-read x-rays and review medical records. In any given case, I am confronted with a physical examination performed by the employer's physician, numerous x-ray re-readings made by the employer, and one or more reports by pulmonary specialists based on reviews of the evidence in the record. A claimant cannot possibly win a black lung case these days without expending resources to match these efforts by the coal companies. This is both expensive for the claimant and very time-consuming for the lawyer. In addition, a claimant's lawyer must spend time answering interrogatories propounded by the employer's counsel and appearing at depositions initiated by the employer's counsel. As a result of the complexity of the cases, the need to respond to the employer's evidence, and the usual necessity of submitting a post-hearing brief, I usually spend between 40 and 50 hours on a single black lung case just at the hearing level. This does not include

the time spent writing multiple briefs on appeal. I can only be paid for this time if I win the claim, and there is no way to predict when I might get paid even if I do win the claim.

Over the years I have become familiar with lawyers who specialize in black lung claims throughout West Virginia and particularly in the northern part of West Virginia where I practice. As a result of the factors set forth herein, very few lawyers are now willing to represent claimants in black lung cases. Over the years I have tried to bring other lawyers in this geographical area into the practice of black lung law on behalf of claimants. Of those who I have tried to encourage in this work, I know of only one who is still doing it. Some of the others are not real happy with the fact that I got them into the field. At the present time I know of only two other lawyers in northern West Virginia who represent claimants with the same degree of skill which I strive for in my practice.

An additional factor in the inability of claimants to obtain representation in black lung cases in northern West Virginia is the fact that District 31 of the United Mine Workers of America no longer represents claimants. Attached to this affidavit is a form letter sent by District 31 to its membership on January 26, 1987. As the letter states, District 31 withdrew from representing claimants 60 days from the date of that letter. Also attached to this affidavit is a letter sent by District 31 to its membership on June 25, 1987. This letter, which I believe was designed to try to assist members of the union in securing representation, listed two lawyers in northern West Virginia who might represent them. The two lawyers are myself (together with my partner, Richard Paul Cohen, who leaves the practice of black lung entirely up to me in our firm) and Gary Martino. It is my understanding that Mr. Martino has also greatly restricted his black lung practice because of the factors set forth in this affidavit.

Hence, it is my belief that very few claimants are now being represented in their black lung claims. This results from a variety of factors, most of them attributable to the Department of Labor. I cannot believe that the Department of Labor is not aware of this situation. Because of the Department of Labor's continued statements to claimants that they may obtain free representation from lawyers in black lung cases, together with the Department of Labor's unwillingness to take any steps to change the situation, I have come to the conclusion that the Department of Labor probably desires the result of few claimants having representation, or at least is satisfied with it. [SIGNATURE AND ACKNOWLEDGEMENT OMITTED]

UNITED MINE WORKERS OF AMERICA
BENEFIT SERVICE FUND

JAMES SLUSSER - DIRECTOR
LOWELL SATTERFIELD - ASST. DIRECTOR

TELEPHONE 363-7500

UNITED MINE WORKERS BUILDING
310 GASTON AVENUE
FAIRMONT, WEST VIRGINIA

FILE NO.
SSA NO.
CLAIM NO.

June 25, 1987

Dear Sir and Brother:

Please find listed below the names, addresses and telephone numbers of attornies you might like to contact to see if they would represent you on your federal black lung claim.

Gary Martino, Attorney
Claggett, Gorey, and Martino Law Firm
99 Fairmont Avenue
Fairmont, West Virginia 26554
Phone: (304) 367-1514

Richard Paul Cohen, Attorney
Robert F. Cohen, Jr., Attorney
Cohen, Abate and Cohen Law Firm
Security Bank Building
Fairmont, West Virginia 26554

If you have any questions, please do not hesitate to contact our office.

Fraternally yours,

James H Slusser

James H. Slusser, Director

JHS/wc

UNITED MINE WORKERS OF AMERICA
BENEFIT SERVICE FUND

JAMES SLUSSER - DIRECTOR
LOWELL BATTERFIELD - ASST. DIRECTOR

TELEPHONE 363-7500

UNITED MINE WORKERS BUILDING
310 GASTON AVENUE
FAIRMONT, WEST VIRGINIA 26554

FILE NO.
SSA NO.
CLAIM NO.

January 26, 1987

Re: Federal Black Lung Claims

Dear Member:

The District 31 Compensation Department has provided assistance and legal representation to the membership over the years on state and federal black lung claims. The Benefits Service Fund receives Fifty Cents ($0.50) of each member's dues for this purpose.

The membership dues reimbursement has dropped drastically due to layoffs and closure of mines. The working membership has been reduced from 13,000 members to a little more than 5,000.

In order for the Compensation Department to continue operation the District 31 Executive Board and the Trustees of the Benefits Service Fund have voted to cease legal representation on federal black lung claims.

Legal representation from private counsel can be obtained at no cost to the claimant, if accepted by private counsel, because the Federal Trust Fund itself pays for legal representation and expenses on all claims won.

Legal representation will continue for a period of sixty (60) days from the date of this letter on all claims. No further legal representation will be provided after April 1, 1987. The Compensation Department will still

be available for the filing of claims and filling out of forms regarding federal black lung.

Fraternally yours,
Trustees, Benefits Service Fund

Eugene Claypole

Eugene Claypole

John Darcus

John Darcus

James H. Slusser

James H. Slusser

STATE OF WEST VIRGINIA,
COUNTY OF MERCER, To-wit:

I, FREDERICK K. MUTH, of 2920 East Cumberland Road, Bluefield, West Virginia, Attorney at Law, after being duly sworn, depose and say:

"I am an Attorney at Law practicing in Bluefield, West Virginia, and have practiced in the State of West Virginia for over 15 years. A significant portion of my practice since 1973 has been devoted to the representation of claimants for occupational pneumoconiosis benefits and federal black lung benefits before the State Workers' Compensation Fund and the Social Security Administration and U.S. Department of Labor, respectively. During that period of time, I have represented at least several thousand individual claimants for benefits. In recent years it has come to my attention as a practitioner in this field, that it has become increasingly difficult for potential claimant beneficiaries to retain skilled and competent representation primarily because of the fee structure which has been imposed under the federal program.

Prior to enactment of the 1972 amendment to the Federal Coal Mine Health & Safety Act, customary practice for retention of claimant's attorneys had been to accept employment on a so-called contingent fee basis similar to the practice then and now prevailing for retention of counsel by plaintiffs in personal injury litigation. The most common practice prior to the 1972 amendment had been for claimants to employ counsel on a contingent basis involving counsel's entitlement to 25 percent of retroactive benefit payments in the event of successful recovery and after deduction for expenses necessarily incurred in making the recovery. After the initial amendment this practice was altered by a federal regulation which then imposed upon attorneys the requirement to file a formal fee petition with the Social Security Administration, who was then administering

the federal program. As a result, counsel was then required under the so-called Trust Fund theory to submit a fee petition to the Administration detailing the nature and extent of services rendered in support of an authorized fee by the Administration which would be deducted from a claimant's retroactive benefit payable. The practice under the regulation was justified by the Federal Court system on the basis of the so-called Trust Fund theory with the rationale being offered that since benefits provided under the program were primarily for the purpose of compensating individuals who qualified, the administering agency had a Trust Fund duty imposed to insure that such intent would be indeed implemented. See generally 20 C.F.R. §140.686 and §410.687. This system also provided for a challenge to a fee sought to be charged for services rendered by the successful claimant himself. Upon implementation of the 1977 amendment to the Federal Coal Mine Health & Safety Act, further provisions in attorney fee regulations were had pursuant to 20 C.F.R. §725.365-367. The new regulations altered the prior practice by imposing directly upon the employer or upon the Trust Fund responsibility for direct payment of attorney fees pursuant to the aforesaid petitioning scheme without such funds being deducted from a claimant's retroactive benefit except in cases where the attorney was retained prior to a denial of his claim. Informally, the U.S. Department of Labor, who took over responsibility for administration of the program in July of 1973, however, initiated the practice of imposing maximum hourly fees for services rendered while retaining under the regulation the proviso that fees would only be paid in instances of successful recoveries. Fees paid initially and despite the contingent nature of the rearrangement were customarily permitted at approximately Fifty Dollars ($50.00) to Sixty Dollars ($60.00) per hour. From initial retention of counsel to the point of successful conclusion of a case often involved time periods of two to eight years

or more. Gradually allowances by the agency on the basis of contingent recoveries and hourly rates have worked their way up to the current level where the representative may expect fees of approximately Eight-five Dollars ($85.00) per hour being permitted by the U.S. Department of Labor's Office of Deputy Commissioner and up to One Hundred Twenty-five Dollars ($125.00) an hour for services rendered before the Office of Administrative Law Judges or Benefits Review Board. At the present time, litigation in a typical case will average between two and eight years depending upon the length of appellate litigation. At the same time significantly greater and more stringent requirements for eligibility of claimants as well as the sophistication of defense techniques has resulted in much lower levels of claims allowance by the agency.

The foregoing situation has resulted in far fewer qualified attorney representatives being willing to accept employment, and in many instances attorneys are no longer willing to represent claimants at all. I and other members of my firm have particularly noted the increase in interviews with claimants who were once represented by other attorneys where the prior representative has withdrawn. In informal discussion with fellow members of the Bar, we have been given to understand that the primary reason for the decline in the numbers of attorneys willing to accept employment in such cases has been because of the length of litigation together with the relatively low rate of compensation as compared with fees available in other forms of contingent fee litigation. Such factors along with the increasingly more complex nature of the litigation has obviously forced the withdrawal of many otherwise qualified claimant representatives from the field.

Currently most employer defense efforts are concentrated in the hands of relatively large urban law firms who specialize in the defense of such claims on behalf of their clients. The total situation has had the net effect of

depriving many individual claimants with marginal or less than optimal cases of adequate representation, and indeed it has become increasingly common to find instances of U.S. Department of Labor hearing dockets populated primarily with *pro se* claimants. Increasingly, firms, such as my own, become inundated with interviews with prospective clients who have been unsuccessful in their efforts to retain competent representation. This situation results in firms, such as ours, being highly selective with respect to claims wherein we will accept employment so as not to overburden the case load of individual attorneys within the firm.

It is not uncommon for particularly desperate individuals to offer individual attorneys unauthorized "bonuses" as an inducement for accepting employment. Although I have never accepted such unauthorized payment, and continue to refuse to do so, the fact that such inducements are offered in the first instance would most certainly appear to be an indication of the desperation of many of our potential clients.

Finally, it should also be pointed out that it has become an increasingly common tactic among firms engaged in employer defense of these claims to expand defense budgets in individual claims for the purpose of quantifying evidence, often times to an outrageous extent. Aside from the question of attorney fees, employers will often engage in the practice of rereading x-rays to such an extent that even a claimant with a meritorious case may have difficulty providing the cost necessary for equalizing evidence. The practice extends to bringing in professional consultants at high expense to the employer to review medical records and to render opinions in support of a defense. Individual claimants often find it impossible to support the cost of equalizing such evidence, and this, in turn, significantly diminishes the chances for a successful recovery. Attorneys who are experienced in this form of litigation know too well that such practices by employer's representatives will also

have the effect of diminishing the chances for recovery on the part of a claimant, and this, in turn, given the present fee structure, further diminishes a claimant's chance for retaining competent and knowledgeable counsel.

For the foregoing reasons, I would strongly urge that serious thought be given by members of the State Bar Committee to recommendations to the appropriate agencies and courts for a review and revision of those rules and regulations dealing with claimant attorney representation and the method provided by such rules and regulations for payment of attorney fees."

Further the deponent saith not. [SIGNATURE AND ACKNOWLEDGEMENT OMITTED]

AFFIDAVIT

I, Robert T. Noone, hereby state as follows:

I am an attorney in Logan County, West Virginia who has been practicing in the area of Black Lung for approximately five years. At present, I have seriously restricted my intake of new cases to approximately one out of every thirty possible claimants who consult with my office. It has been my experience that even meritorious cases are regularly being denied, and thus I cannot afford to practice this area of law any more.

I have witnessed this past year the denial of miners who have over 30 years coal dust exposure, positive x-rays, qualifying blood gas studies, and physicians opinions indicating total disability. Unfortunately, my clients cannot accumulate the funds necessary to counter all the negative medical evidence of the employer's "consulting" physicians who render reports that the claimant at age 65 can return to his former employment, or that the disability is because the claimant is fat or he smoked.

Normally a claimant must have at least $1,500 to pay for medical evaluations by qualified experts. This is simply too much costs for the average disabled miner. Therefore, without proper funds for evaluations, I have to turn the case away. I would like to advance the costs of evaluation, but I already front the costs of my staff time, my time, travel time and expenses to depositions, postage, phone calls, copying costs, etc. Further, I realistically know that many cases are denied despite the positive medical evidence produced by the claimant.

I would advocate that some fee structure be permitted to allow attorneys to further examine cases for fair compensation, rather than donate time. So often I see winnable cases that I just cannot take because I cannot take the chance financially due to the great investment of attorney and paralegal time.

This problem is made worse by the fact that, even when I win cases, the ALJ's Order is often appealed, and thus I must wait another couple years to get paid if I ultimately win.

I've never conversed about compensation paid to employer's counsel, but I presume that they do not have to wait several years for payment. I know that there fees are not contingent; however, it may help make matters more fair if *both sides* operated under a contingent fee. Employers might not protest the clear case and appeal the supported decision if their counsel was paid only in the event of a victory.

The above is not empirical fact, but rather gut feeling from practicing black lung law. At this point I feel rather discouraged about the state of the law in this field. [SIGNATURE AND ACKNOWLEDGEMENT OMITTED]

IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA
AT CHARLESTON

Disciplinary Proceedings No. 18396

COMMITTEE ON LEGAL ETHICS OF THE
WEST VIRGINIA STATE BAR,
Complainant,

v.

GEORGE R. TRIPLETT, a member of the
West Virginia State Bar,
Respondent.

AFFIDAVIT

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, to-wit:

I, Grant Crandall, Crandall & Pyles, P. O. Box 3465, Charleston, West Virginia 25334, having been duly sworn, do hereby depose and state as follows:

1. I am a partner in the firm of Crandall & Pyles, a law firm with seven attorneys and nine staff people located in two offices, Charleston and Logan, West Virginia. My educational background includes B.A. from Grinnell College, Ph.D. from Oxford University where I was formerly a Rhoades Scholar, and J.D. from U.C.L.A. I have handled black lung cases regularly for more than thirteen years. A substantial portion of my case load is comprised of black lung cases. I am the principal author of the amicus brief filed by the UMWA in the U.S. Supreme Court in *Mullins Coal Co. v. Director,* No. 86-327 (12/14/87). I have conducted numerous seminars and training sessions on black lung and I am the author of the book *Black Lung Litigation* and am also the author

The Training Guide for Handling Black Lung Cases published by the Legal Services Corporation. I regularly advise and am associated as counsel by numerous other law firms because of my recognized expertise in black lung litigation.

2. Over the past decade the number of attorneys willing to undertake any significant number of federal black lung cases on behalf of claimants has dwindled from a fairly sizable number to approximately one dozen in the entire State of West Virginia. This fact is due to severa! factors. The cases have become increasingly hard to win and there is a long period between taking a case and the final completion of the case. Perhaps the single greatest problem from an attorney's point of view is the burdensome process of handling fee petitions in these cases. These fee petitions require substantial detail in the timekeeping aspects. Bills have to be submitted separately to the Deputy Commissioner, Administrative Law Judge, Benefits Review Board and Circuit Court of Appeals, depending the final level to which the case ultimately ascends. That means in the typical case that there are either two or three separate bills that have to be submitted. Additionally, the hourly rates typically awarded are not sufficient to make black lung practice practically attractive. On top of that is the fact that even when an Administrative Law Judge awards a certain hourly rate, the Deputy Commissioners very frequently award a lower hourly rate in the same case. The Deputy Commissioner often awards a lower hourly rate which is completely uncompetitive for contingency fee work of this nature.

3. In our law firm we periodically review the financial considerations of each of our areas of practice. Approximately two years ago we examined our black lung practice. At that time, we found that

we were not making money in the black lung practice and the situation has become even more difficult as fewer cases are now approved. We seriously considered dropping our federal black lung practice, but ultimately concluded that this would work such a substantial hardship on the people of the state that we felt morally obliged to continue federal black lung representation. We do have substantial experience in this field and we know that large numbers of West Virginians are unable to obtain competent black lung counsel, so we simply decided to remain in the field despite the fact that it is not a money-maker for our law firm. We have tried to make up for this fact by obtaining other disability cases for the same clients, but the black lung side of our practice itself has no economic incentive for continuing it.

4. The factors which make it unattractive for private attorneys to undertake claimants' representation in black lung cases have become even worse at the same time that the United Mine Workers of America has reduced the provision of legal counsel to its members with regard to these claims. The three UMWA districts in West Virginia have all experienced substantial financial difficulties in the past few years with substantial decline in their memberships and a very significant increase in the legal work responsibilities for each district. That has meant that each UMWA district has had to look much more carefully at its expenditures for legal services and the districts have become far more restrictive in handling federal black lung claims.

5. Because we continue to do a fairly sizable number of black lung claims, we are regularly sent the hearing notices by the Department of Labor, Office of Administrative Law Judges. We also attend hearings on a regular basis on behalf of our clients.

On the basis of this information we have seen that in last year or year and a half about one half of all claimants come to federal black lung hearings with no legal representation. They have indicated many times that they are unable to find any lawyer who is willing to take their case. It is my observation that many of the people without legal representation have claims that have at least reasonable legal merit. It is not simply a situation in which frivolous claims are asserted and thus lawyers are unwilling to undertake them because they have no reasonable chance of recovery. In the area of black lung practice, the West Virginia Bar appears not to have met its responsibilities in providing adequate representation to the citizens of the State. While this is understandable, given the poor economic return on such cases, I believe that the Bar ethically has a duty to assist people with these claims.

Further the affiant sayeth not. (SIGNATURE AND ACKNOWLEDGMENT OMITTED)

BEFORE THE COMMITTEE ON LEGAL ETHICS
OF THE WEST VIRGINIA STATE BAR

L.E.C. 86-056

IN RE: GEORGE R. TRIPLETT, a member
of The West Virginia State Bar,
Respondent.

Elkins Motor Lodge,
Elkins, West Virginia
Law Office of
George R. Triplett,
Elkins, West Virginia
August 3, 1987

This matter came on for hearing at 9:35 a.m., pursuant to notice, before the Subcommittee on Legal Ethics.

BEFORE: JOHN C. SKINNER, JR., ESQUIRE,
Chairman
WARREN A. THORNHILL, III, ESQUIRE
DAVID HARRIS, Lay Member

* * *

excused to leave. Thank you for coming today.

(Witness Hill excused.)

(Witness Ball sworn.)

THEREUPON came

EUNA BALL,

who was called as a witness on behalf of the Respondent and, having been first duly sworn according to law, was examined and testified upon her oath as follows:

DIRECT EXAMINATION

BY MR. FAHRENZ:

Q Would you state your name for the record, please?

A Euna Ball.

Q Ms. Ball, where do you live?

A Monterville, West Virginia.

Q How long have you lived there?

A Well, I've lived near Monterville most of my life. I moved away for about ten (10) years and came back.

Q I understand that you are a widow; is that correct?

A Yes, I am.

Q Now, what did your husband do?

A He was a coal miner.

Q Had your husband tried to get Black Lung while he was alive, Black Lung benefits?

A Yes, he had.

Q Had he been successful?

A No.

Q Now, he died; is that correct?

A Yes.

Q What did you do at the time he died, to help you with your benefits?

A Well, they took an autopsy of him, and I had taken the papers and went to Jennifer Sargus.

Q Now, Jennifer Sargus is an attorney; is that correct?

A Correct.

Q Is she from Wheeling?

A Uh-huh.

Q And she was a Union lawyer; is that correct?

A Yes.

Q Now, the autopsy, did it show that your husband had Black Lung?

A Yes.

Q Even though he had been denied before, the autopsy showed that he had the disease?

A (Indicating affirmatively.)

Q You have to answer.

A Yes.

Q Now, will you tell the Committee, if you would, what Ms. Sargus did on your behalf?

A She worked on it a while and I got a monthly check, but then she sent me the papers and said they owed me back pay of around eight ($8,000) to nine thousand dollars ($9,000); and she said she was unable to get it and if I could get a lawyer to work on it, that she'd advise me to do so, and she sent me the papers. They came through the mail.

Q She told you that she had determined that you had a right to more benefits, that is, that they shorted you?

A Yes.

Q But she wouldn't do anything to help you get those benefits?

A That she was unable to get them.

Q Okay. What did you do then?

A Well, I got in touch with Mr. Triplett.

Q Has Mr. Triplett ever represented you before?

A No, he hadn't.

Q Were you family friends or personal acquaintances with Mr. Triplett?

A No.

Q That was the first time you had ever met Mr. Triplett?

A The first time I'd met him.

Q Okay. Will you tell the Committee, if you would, what you discussed during your first meeting with Mr. Triplett?

A We discussed trying to get my Black Lung for me.

Q To get the eight thousand dollars ($8,000)?

A Yes, eight or nine.

Q So, technically, you already had the Black Lung benefits?

A Check benefits, yes. I got a check each month.

Q So you went to consult with him about getting the eight ($8,000) or nine thousand dollars ($9,000) they had shorted you?

A Yes.

Q Did you discuss anything at that time about fees?

A Yes. I told him I'd give him twenty-five percent (25%) of what I got.

Q And he suggested that number to you, the twenty-five percent (25%)?

A Yes.

Q And you agreed to that?

A Yes, I did.

Q Now, did you ever pay Mr. Triplett any money, cash?

A I paid him cash two (2) times. I think it was a hundred and fifty (150) one time and fifty dollars ($50) one time.

MR. FAHRENZ: Ms. Dusic, could we agree that — I think our records indicate, and I don't think it's in the stipulation, that it was October 28th, 1981, of a hundred and fifty dollars ($150), and February the 18th, 1982, of fifty dollars ($50), and I believe our first representation of this client was May the 1st, 1981.

MS. DUSIC: I have no problem stipulating to that.

CHAIRMAN SKINNER: So stipulated.

BY MR. FAHRENZ:

Q Now, what did you understand that the two hundred dollars ($200) was for?

A Expenses.

Q Mr. Triplett explained that to you, too, that he would have expenses in telephone calls and records and things of that nature?

A Yes.

Q Now, did you ever receive any monies from the Department of Labor that they had previously shorted you? Did they ever pay you the money that they had shorted you?

A Yes, part of it. I still haven't gotten all of it.

Q How much did they pay you?

A It was between eight (8,000) and nine thousand (9,000). I'm not sure exactly.

Q Now, what did you do when you received the

* * *

THEREUPON came

MILFORD L. GIBSON,

who was called as a witness on behalf of the Respondent and, having been first duly sworn according to law, was examined and testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. FAHRENZ:

Q For the record, would you state your name, please?

A My name is Milford L. Gibson, G-i-b-s-o-n.

Q Where do you reside, Mr. Gibson?

A 2 Ridge, R-i-d-g-e, Lane, L-a-n-e, Elkins, West Virginia.

Q What is your business, profession, or occupation?

A I'm loafing now, but for forty (40) years I practiced law in West Virginia.

Q I believe, your dad was also a lawyer?

A Uh-huh.

Q And he's a former congressman and U. S. Attorney in this district?

A He wasn't a congressman. We fell flat on

* * *

Q You were one of the Public Service Commissioners?

A I was a Commissioner.

Q So that being, pretty much, a full-time job, you lived in Charleston for that period?

A I lived in Charleston.

Q During that same period of time that you were a Public Service Commissioner, did you serve in any capacity for the West Virginia State Bar?

A Yes. I was on the — with the State Bar for seven (7) years.

Q In what capacity did you serve?

A Well, I was just a member of the Commission. I don't know how it's operating now, but the old deal, you would have five (5) to seven (7) people have a hearing.

Q You're talking about the State Legal Ethics Committee, correct?

A State Legal Ethics, yes.

Q Of the West Virginia State Bar?

A Yes.

Q Okay. Now, once you left the Public Service Commission, did you move back to Elkins?

A Yes.

Q Did you engage in private practice there?

A I did.

Q Did you take any Black Lung cases?

A Two (2).

Q Will you relate to the Committee your experience on that?

A Well, when I came out – and at that time, there were some of these cases floating around. Well, I tried one of them, because I decided that maybe I might like that kind of work. So I took a shot at it, and it worked beautifully; everything went great. So I then tried another one and it just went to hell. It didn't do – it was a mess from the beginning.

Q In regard to what?

A Well, in the first place –

MS. DUSIC: I'd like to make an objection. I don't think that how the system works is relevant, unless somehow this was discussed with Mr. Triplett and formed the basis of some decision. His experiences with Black Lung, I think, are irrelevant. As I said, I don't think the statute and the way that attorneys have had experience with it, with respect to whether they're fair or not, or anything like that, is relevant to this.

MR. FAHRENZ: Ms. Dusic answered her own objection when she stated that unless this served as a basis for later advice to Mr. Triplett, which is exactly what I'm trying to lay the foundation for.

MS. DUSIC: I think it more appropriate to ask him what advice he gave him, rather than go into a big background as to what his experiences are.

CHAIRMAN SKINNER: Well, I think we'll conditionally admit it.

MR. FAHRENZ: It goes to a specific competency.

CHAIRMAN SKINNER: Go ahead, sir.

THE WITNESS: Well, as I say, the first time it was handled, it went real well, and then I tried another one and it didn't – one time you'd have the State people working it and the next time you had the Federal people, and there was always some little thing between those deals and it was just aggravating. So I never went in for any more of them.

BY MR. FAHRENZ:

Q So your first experience was with the State?

A With the State; and what they said at that time, you handled your case and you did it for, I think it was, twenty-five percent (25%) of the amount you got. And on the next one, it was a Federal one and every time – well, not every time, but most of the time, you'd come in, you'd get your case lined up, you'd get it ready, and then it was there on your desk and you could – well, it was just one of those – you could take it and put it someplace or you could – they didn't – they never seemed to close the case. They'd say, now hold this to a certain time, and It went that way. So it got to the place that I just, as I said, I just – I wouldn't fool with it.

Q Is it safe to say that you had trouble dealing with the Federal bureaucracy?

A Yes.

Q Now, I take it, you do know George Triplett?

A Yes.

Q How did you come to know Mr. Triplett?

A I found him standing on the road up here next to the courthouse one time, when I was out of the U. S. Attorney's Office and he was just getting cranked up.

* * *

at 2:30 p.m., the proceedings continued as follows:)

(Witness Miller sworn.)

THEREUPON came

WILLIAM M. MILLER,

who was called as a witness on behalf of the Respondent and, having been first duly sworn according to law, was examined and testified upon his oath af follows:

DIRECT EXAMINATION

BY MR. FAHRENZ:

Q Would you state your name for the record, please, sir?

A William M. Miller.

Q Do you have a nickname, Mr. Miller?

A Yes. Mont.

Q Where do you reside, Mr. Miller?

A 303 Walnut Street, Parsons.

Q How long have you lived there?

A About eight (8) years.

Q What is your business, profession, or occupation?

A I'm an attorney.

Q Do you hold any public position in Tucker County?

A Prosecuting Attorney in Tucker County.

Q And how long have you been the prosecuting attorney?

A Going on seven (7) years.

Q Do you know George Triplett?

A Yes, I do.

Q How did you come to know Mr. Triplett?

A Mostly through cases. I prosecuted them and George would defend them.

Q In your observations of Mr. Triplett, how would he represent his client?

A George would do a good job for his client. I always hated to get George on the other side, usually, because he would drive me crazy either with paperwork or phone calls, one or the other. George was, I would say, one of the better defense attorneys in the area.

Q Do you ever know of him intentionally misrepresenting or misstating facts to you?

A No.

Q Do you ever know of him committing any

* * *

Q In an honest and ethical manner?

A Yes; but sometimes, you know, that can bug you a little bit.

Q Would you agree that he's tenacious?

A Yes, very much so.

Q Did you read in the newspapers that George had been charged with ethical violations?

A Yes, I did.

Q That was publicized in your area, too?

A Yes, it was. We get the Elkins Inter-Mountain. That's the only daily paper we get.

Q And did that change your opinion as to George Triplett's reputation?

A No, it didn't.

Q Do you presently handle cases for the Department of Labor?

A Yes, I do.

Q What has been your experiences with it?

MS. DUSIC: Objection as to the relevancy.

MR. FAHRENZ: It goes to mitigation.

CHAIRMAN SKINNER: It's offered only for that purpose?

MR. FAHRENZ: Correct.

CHAIRMAN SKINNER: Okay, then we'll admit it. You can answer.

THE WITNESS: The problem I've had, I've represented probably seven (7) or eight (8) cases and won three (3) or four (4) and I've never been paid in any of them. I had to look at them this way. Being a prosecutor is kind of a public official. You know, I try to take the cases, but with no expectation anymore of being paid.

I think I won my first one in 1980. I think my client got thirty-some thousand dollars, and I never got paid; and after about two hundred dollars ($200) worth of

phone calls and mail to Washington, I gave up and just decided to forget it.

MR. FAHRENZ: I have no further questions.

CHAIRMAN SKINNER: Cross?

CROSS-EXAMINATION

BY MS. DUSIC:

Q Mr. Miller, I am Sherri Dusic. I'm an attorney with the State Bar. Do you have personal knowledge of the facts underlying the statement of charges?

MR. FAHRENZ: No questions for us.

MS. DUSIC: Nothing.

CHAIRMAN SKINNER: Any reason to retain this witness?

MR. FAHRENZ: He's got a long drive. I'd say, good luck and be careful.

CHAIRMAN SKINNER: You may be excused. Thank you for coming.

(Witness Miller excused.)

(Witness Cain sworn.)

THEREUPON came

JAMES F. CAIN,

who was called as a witness on behalf of the Respondent and, having been first duly sworn according to law, was examined and testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. FAHRENZ:

Q Would you state your name, please, sir?

A James F. Cain.

Q Mr. Cain, were do you reside?

A I reside in Elkins, West Virginia.

Q What is your business, profession, or occupation?

A I'm an attorney at law and I'm also the prosecuting attorney of this county.

Q How long have you been admitted to practice?

A Since 1963.

Q And how long have you been the prosecuting attorney of this county?

A Since 1965.

Q I take it, then, you have been prosecuting attorney both when Mr. Triplett wore a black robe and when he was on the other side of counsel table?

A That is correct.

Q How long have you known Mr. Triplett, I should ask?

A I've known Mr. Triplett all of his life, or the best portion of it. We were in college together and law school together, and I think I first knew Mr. Triplett along about high school time.

Q Did you engage in any athletic events together?

A Yes, sir. We were on the Davis and Elkins College football team in 1955.

* * *

Q And you were aware of that? It was in the Elkins newspaper?

A Yes, sir.

Q Did that change your opinion as to Mr. Triplett's character traits?

A No, sir.

MR. FAHRENZ: No further questions.

CROSS-EXAMINATION

BY MS. DUSIC:

Q Mr. Cain, I'm Sherri Dusic. I'm counsel with the State Bar. So you're saying that you have no personal knowledge about the facts underlying the statement of charges; is that correct?

A No, no personal knowledge.

Q Are you a full-time prosecutor, or do you have a private practice?

A We have a private practice, also, but it's somewhat limited by virtue of the office; but all of West Virginia, with the exception of the larger counties, are part-time prosecutors.

Q Do you have any experience, yourself, with Black Lung work?

A I've had a couple of cases. They were a long time ago, and the reason I don't take Black Lung cases anymore is because of the difficulty that we've had in getting fees.

Q How long ago did you have Black Lung cases?

A The first one I had was back in the early sixties ('60's), the mid sixties ('60's), or maybe the early seventies ('70's); and then the second one started in '72 and finally wound up in '80, I believe, or thereabouts, and that's how long it took to get through.

Q Did you file fee petitions?

A Yes, ma'am.

Q How did you know to file fee petitions?

A Well, because – when they first started out, I don't believe you had to do that, but then they changed the rule, somewhere along between early 1970 and 1980, to require fee petitions to be filed.

But the only two (2) cases I had – I had three (3) cases and I filed fee petitions in all of them; and one (1) case, and the reason I don't take them anymore, twice it went to the Benefits Review Board in Washington, the same case. The first time, they denied the fee petition all the way through the Labor Department, and I appealed clear to the Benefits Review Board in Washington, and they granted it and they still wouldn't pay the thing. So we had to go back through the process again and get a second approval.

Q When you say "they," who was supposed to be paying the fee? Was there an employer in this case?

A Well, there was a question as to who pays the fee, but I believe the client was ultimately responsible for it, at least the old Regulations, but the government has to approve it, as I understand it, the Labor Department, and they did not approve it.

They approved the fee petition in the one case without any trouble. In the second case, it was terribly difficult. As I say, twice it went to the Benefits Review Board, and there was a published opinion on the case;

and after that, I just frankly – it was an eighteen-hundred-dollar ($1,800) fee, and my time, on my own part of it, and the time that I expended on the case, was far more than what we ever got from it, ten (10) years of legal work, too.

Q Did you ever enter into a contingency fee

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